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8 UNITED STATES DISTRICT COURT  
9 CENTRAL DISTRICT OF CALIFORNIA  
10

11 ALICIA B., ) NO. CV 18-5084-E  
12 )  
13 Plaintiff, )  
14 )  
15 v. ) MEMORANDUM OPINION  
16 )  
17 NANCY A. BERRYHILL, Deputy ) AND ORDER OF REMAND  
18 Commissioner for Operations, )  
19 Performing duties and functions not )  
20 reserved to the Commissioner of )  
21 Social Security, )  
22 Defendant. )  
23 )  
24 )  
25 )  
26 )  
27 )  
28 )

29 Pursuant to sentence four of 42 U.S.C. section 405(g), IT IS  
30 HEREBY ORDERED that Plaintiff's and Defendant's motions for summary  
31 judgment are denied, and this matter is remanded for further  
32 administrative action consistent with this Opinion.  
33

34 PROCEEDINGS  
35

36 Plaintiff filed a complaint on June 8, 2018, seeking review of  
37 the Commissioner's denial of benefits. The parties consented to  
38 proceed before a United States Magistrate Judge on July 19, 2018.

1 Plaintiff filed a motion for summary judgment on December 31, 2018.  
2 Defendant filed a motion for summary judgment (titled as an opposition  
3 to Plaintiff's motion for summary judgment) on January 29, 2019. The  
4 Court has taken the motions under submission without oral argument.  
5 See L.R. 7-15; "Order," filed June 14, 2018.

## 6 7 **BACKGROUND**

8  
9 Plaintiff asserts disability since December 1, 2009, based on a  
10 combination of alleged impairments (Administrative Record ("A.R.")  
11 496-503, 521-22)). As detailed below, treating physicians Dr. Lee  
12 Razalan and Dr. Miguel De Perio opined that Plaintiff's impairments  
13 disable her from all employment. See A.R. 1885-87, 1973-74, 2055-57,  
14 2118-20.

15  
16 An Administrative Law Judge ("ALJ") reviewed the record and heard  
17 testimony from Plaintiff, a vocational expert and a medical expert  
18 (A.R. 49-61, 406-23). In a decision dated March 24, 2017, the ALJ  
19 found that Plaintiff has the following severe impairments: obesity;  
20 irritable bowel syndrome; fibromyalgia; spondylolisthesis of the  
21 lumbar, cervical and thoracic spine; discogenic disease of the  
22 cervical spine; and hypertension (A.R. 51). However, the ALJ also  
23 found Plaintiff capable of performing a limited range of light work.  
24 See A.R. 54-60 (adopting medical expert's residual functional capacity  
25 assessment at A.R. 410-11, and giving "little weight" to the opinions  
26 of Drs. Razalan and De Perio). The ALJ identified certain light jobs  
27 Plaintiff assertedly could perform, and, on that basis, denied  
28 disability benefits from August 27, 2014 (the date of Plaintiff's

1 application) (A.R. 60-61 (adopting vocational expert testimony at A.R.  
2 420-21)).

3  
4 On April 26, 2018, the Appeals Council denied review (A.R. 1-6).  
5 Plaintiff had submitted to the Appeals Council additional medical  
6 records, including records from Drs. Razalan and De Perio for the  
7 period from October 27, 2016 through December 11, 2017, some of which  
8 the Appeals Council declined to "consider and exhibit" (A.R. 2).  
9 According to the Appeals Council, the evidence pre-dating the ALJ's  
10 adverse decision did not show a reasonable possibility of changing the  
11 outcome of the decision, and the evidence post-dating the ALJ's  
12 adverse decision did not relate to the period at issue (A.R. 2).

#### 13 14 STANDARD OF REVIEW

15  
16 Under 42 U.S.C. section 405(g), this Court reviews the  
17 Administration's decision to determine if: (1) the Administration's  
18 findings are supported by substantial evidence; and (2) the  
19 Administration used correct legal standards. See Carmickle v.  
20 Commissioner, 533 F.3d 1155, 1159 (9th Cir. 2008); Hoopai v. Astrue,  
21 499 F.3d 1071, 1074 (9th Cir. 2007); see also Brewes v. Commissioner,  
22 682 F.3d 1157, 1161 (9th Cir. 2012). Substantial evidence is "such  
23 relevant evidence as a reasonable mind might accept as adequate to  
24 support a conclusion." Richardson v. Perales, 402 U.S. 389, 401  
25 (1971) (citation and quotations omitted); see also Widmark v.  
26 Barnhart, 454 F.3d 1063, 1066 (9th Cir. 2006).

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1 If the evidence can support either outcome, the court may  
2 not substitute its judgment for that of the ALJ. But the  
3 Commissioner's decision cannot be affirmed simply by  
4 isolating a specific quantum of supporting evidence.

5 Rather, a court must consider the record as a whole weighing  
6 both evidence that supports and evidence that detracts from  
7 the [administrative] conclusion.

8  
9 Tackett v. Apfel, 180 F.3d 1094, 1098 (9th Cir. 1999) (citations and  
10 quotations omitted).

## 11 12 DISCUSSION

### 13 14 I. Summary of Relevant Evidence

#### 15 16 A. Plaintiff's Testimony and Statements

17  
18 At the administrative hearing on December 6, 2016, Plaintiff  
19 testified that she lived with her mother and her children (A.R. 412-  
20 13). Plaintiff said that she did no housework and that her mother and  
21 her children did all of the housework (A.R. 413). Plaintiff said that  
22 she cannot work because of severe anxiety, vertigo, a pinched nerve in  
23 her right arm and shoulders, and intermittent problems with pain,  
24 tingling, and tightness in differing parts of her body, including pain  
25 that wakes her up (e.g., the previous week she reportedly woke up with  
26 pain in the ball of her foot that prevented her from putting any  
27 pressure on her foot) (A.R. 413-15). Plaintiff said she had been  
28 taking Ativan or Lorazepam for the past 10 years for anxiety, which

1 she attributed to being sick and not understanding why (A.R. 415-18).  
2 Plaintiff estimated that she could sit for an hour before getting  
3 tingling and numbness in her buttocks (which can cause her to urinate  
4 on herself), and said that she could stand for "not that long" and  
5 walk for "not that far," reporting she even had difficulty walking  
6 from her vehicle to the hearing room (A.R. 413-14).  
7

8 In a "Function Report - Adult" form prepared more than two years  
9 before the hearing, Plaintiff reported that she had an anxiety problem  
10 that caused her body to ache and limited how much she could be around  
11 other people, sciatic nerve compressions that caused her to lie down  
12 and limit how long she could sit or stand, lumbar spine pain with  
13 radiculopathy, numbness and tingling throughout her whole body, and  
14 depression (A.R. 527). At that time (October of 2014), Plaintiff  
15 reportedly could take her kids to and from school, feed and shower  
16 them, "start" dinner, prepare meals ranging from sandwiches to frozen  
17 dinners to other meals with the help of her then 12 year old child, do  
18 dishes, sweep, mop, and vacuum (every other day with rest between  
19 activities), and shop for groceries twice a week for 10 to 30 minutes  
20 (A.R. 528-30). Plaintiff indicated limitations in lifting, squatting,  
21 bending, standing, walking and sitting (A.R. 532).  
22

23 **B. Records from Plaintiff's Treating Physicians**  
24

25 There exist treating records from Drs. Razalan and De Perio for  
26 the period from January of 2014 through December of 2017. See A.R.  
27 1831-2148 (treatment records through October of 2016 submitted to the  
28 ALJ); see also A.R. 73-103, 118-23 (treatment records from October of

1 2016 through December of 2017 submitted to the Appeals Council). Dr.  
2 Razalan had treated Plaintiff since May of 2006 (A.R. 1931). In the  
3 record before the ALJ, the doctors had diagnosed a number of  
4 conditions, including anxiety/depression, chest pain  
5 (musculoskeletal), persistent neck pain, ovarian cysts, chronic lumbar  
6 spine pain, vertigo, high blood pressure, H. Pylori bacteria, cervical  
7 radiculopathy, degenerative joint disease in the lower extremities,  
8 acute tendonitis in the right leg, gastritis, peripheral neuropathy,  
9 "GERD" (gastro-esophageal reflux disease), cervical disc disease,  
10 lumbar disc disease, irritable bowel syndrome, arthralgia and myalgia  
11 (A.R. 1866, 1894, 1899, 1905, 1922, 1928, 1930, 1958, 1997, 2007,  
12 2032, 2067, 2070-71, 2074, 2077, 2083, 2084, 2088, 2093, 2095, 2100,  
13 2123, 2143, 2148).

14  
15 Plaintiff consulted with Dr. Kenneth Bradley on March 9, 2015,  
16 for pain management including epidural steroid injections (A.R. 1979,  
17 1981). Plaintiff reported a history of lumbar back pain which "waxes  
18 and wanes" with activity, radiating to the hips and down the legs,  
19 with dysesthesia, numbness, tingling, dull achy sensations and spasms  
20 (A.R. 1979). Dr. Bradley observed obvious myofascial plain trigger  
21 points in Plaintiff's lumbosacral area (A.R. 1979). Dr. Bradley gave  
22 Plaintiff a lumbar epidural steroid injection and three trigger point  
23 injections of Toradol (A.R. 1979, 1981).

24  
25 When Plaintiff returned to Dr. Bradley on September 12, 2016, she  
26 reportedly had tenderness and spasm throughout her spine and decreased  
27 sensation at L4-L5-S1, sensory dysesthesias at C4-C5, C5-C6 and C6-C7,  
28 hip, shoulder and knee tenderness, and positive straight leg raising

1 tests (A.R. 1821-22). Dr. Bradley diagnosed low back pain with  
2 radiculopathy, lumbosacral spondylolisthesis, chronic pain syndrome  
3 and fibromyalgia (A.R. 1822). Dr. Bradley again gave Plaintiff a  
4 lumbar epidural steroid injection and three trigger point injections  
5 of Toradol (A.R. 1822-24).

6  
7 Dr. Razalan's and Dr. De Perio's subsequent treatment notes,  
8 which were submitted for the first time to the Appeals Council,  
9 reflect additional diagnoses of fibromyalgia, lumbosacral  
10 spondylolisthesis, generalized pain, scoliosis and sciatica (A.R. 77,  
11 82, 88, 96, 118, 121-23). In a treatment note dated in December of  
12 2016 (also submitted for the first time to the Appeals Council),  
13 consulting rheumatologist Dr. Gilbert Gelfand confirmed Plaintiff's  
14 fibromyalgia based on diffuse myofascial pain above and below the  
15 diaphragm, tenderness to touch, and reported joint pain with  
16 intermittent swelling (A.R. 105-07). Dr. Gelfand also diagnosed  
17 polyarthralgia (id.).

18  
19 According to the available treatment records, Plaintiff  
20 complained of various body pains, swelling, numbness and weakness, for  
21 which Plaintiff was treated with, inter alia, steroid injections,  
22 Gabapentin, Norco and Flexeril for pain, Lorazepam for accompanying  
23 anxiety, and a referral to an orthopedist (although the referral was  
24 not approved). See A.R. 88, 91-92, 101, 106, 122, 1821, 1850, 1865,  
25 1866, 1871-73, 1894, 1905-07, 1922, 1928, 1930, 1958, 1979, 1997,  
26 2007, 2058, 2071, 2074, 2077, 2083, 2088, 2092-93, 2095, 2099-2101,  
27 2105, 2121, 2128, 2130, 2137-39, 2143, 2147-48).

28 ///

1       The record contains a "Medical Opinion Re: Ability to Do Work-  
2 Related Activities (Physical)" form "co-signed" by Dr. Razalan and  
3 dated May 12, 2015 (prior to any diagnosis of fibromyalgia) (A.R.  
4 2055-57). Dr. Razalan opined that Plaintiff could lift and carry less  
5 than 10 pounds, stand and walk less than two hours in an eight-hour  
6 day, and sit less than two hours in an eight-hour day (A.R. 2055).  
7 Dr. Razalan opined that Plaintiff could sit five minutes and stand  
8 five minutes before needing to change positions, she must walk around  
9 every five minutes for five to 10 minutes at a time, and she needs the  
10 ability to shift at will and to lie down at unpredictable intervals  
11 one to three times during the day due to her peripheral neuropathy,  
12 swelling and pain (A.R. 2055-56). Dr. Razalan opined that Plaintiff  
13 could occasionally perform certain postural activities, except she  
14 could never climb ladders, has limits in reaching, handling,  
15 fingering, feeling, pushing and pulling because of pain, and Dr.  
16 Razalan also opined that Plaintiff has environmental limitations (A.R.  
17 2056-57). Dr. Razalan further opined that Plaintiff would miss work  
18 approximately twice a month (A.R. 2057).<sup>1</sup>

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19  
20       <sup>1</sup> The record also contains CalWORKs forms signed by Dr.  
21 De Perio dated September 11, 2014 and September 16, 2015 (prior  
22 to Plaintiff's fibromyalgia diagnosis) (A.R. 1972-74, 2118-20).  
23 Dr. De Perio opined that Plaintiff could stand/walk for 0-2 hours  
24 at one time for a total of 0-2 or 2-4 hours standing/walking out  
25 of an eight-hour day, and could sit for 0-2 hours at one time for  
26 a total of 2-4 hours sitting out of an eight-hour day due to  
27 Plaintiff's sciatic nerve compression, lumbar spine pain with  
28 radiculopathy and obesity (A.R. 1973, 2119). In the most recent  
form, Dr. De Perio opined that Plaintiff is restricted from: (1)  
using her hands/fingers and feet for repetitive motion/movement  
due to neuropathy and muscle spasms; (2) working in cold weather  
due to pain; (3) lifting 10 pounds or more due to her lumbar and  
cervical disc disease, radiculopathy and nerve damage; (4)  
climbing, stooping, kneeling crouching, crawling, or reaching

(continued...)



1 Dr. Razalan provided another "Medical Opinion Re: Ability to Do  
2 Work-Related Activities (Physical)" form dated September 7, 2016 (also  
3 prior to Plaintiff's fibromyalgia diagnosis) (A.R. 1885-87). In this  
4 form, Dr. Razalan expressed similar opinions. See id. (opining, inter  
5 alia, that Plaintiff could lift less than 10 pounds, stand and walk  
6 less than two hours in an eight-hour day, sit less than two hours in  
7 an eight-hour day, would need to lie down at unpredicted intervals  
8 during a work shift, and would miss more than three days of work per  
9 month).<sup>2</sup>

10  
11 The record contains no treating source statements post-dating  
12 Plaintiff's fibromyalgia diagnosis which address Plaintiff's  
13 functional limitations or abilities. There is a referral dated  
14 December 11, 2017, from Dr. Razalan to "Physical Medicine" (Dr. Ziyad  
15 Ayyoub) to complete functional capacity assessment "paperwork" for  
16 social security (A.R. 73). This referral states, "we are unable to  
17 fill out paper work, as [patient] needs functional capacity  
18 test/assessment, referring [patient] to be evaluated for possible  
19 [treatment] with physical medicine" (A.R. 73). Dr. Razalan then  
20 indicated that Plaintiff had suffered fibromyalgia and generalized  
21 body pain for the past 24 months (i.e., since December of 2015)

22  
23 <sup>1</sup>(...continued)  
24 below the knees, from her waist to knees, from her waist to chest  
25 or from her chest to shoulders; and (5) more than occasionally  
26 balancing or reaching above the shoulder (A.R. 1973-74). Dr. De  
Perio opined that Plaintiff is unable to bend side to side, or  
sit or stand for "even a short period of time" due to her severe  
low back and cervical pain with neuropathy (A.R. 1974).

27 <sup>2</sup> The vocational expert testified that a person absent  
28 more than three days per month could not sustain any employment  
(A.R. 421).

1 (A.R. 73) .  
2

3 **C. Emergency Room and Hospital Records**  
4

5 There are records concerning many emergency room visits and one  
6 hospitalization. See A.R. 589-708 (Gardena Hospital records); A.R.  
7 713-942 (Long Beach Memorial Hospital records); A.R. 2407-19 (St.  
8 Francis Medical Center records). These records span the years  
9 2013-16.  
10

11 Plaintiff presented on September 15, 2013, complaining of back  
12 pain radiating down her left leg (A.R. 852). On examination,  
13 Plaintiff reportedly had paraspinal tenderness, decreased range of  
14 motion secondary to pain, and positive straight leg raising tests  
15 (A.R. 853-54). Plaintiff was diagnosed with low back pain with  
16 radiculopathy, given Norco and prescribed ibuprofen, Vicodin and  
17 Flexeril (A.R. 854, 861, 866).  
18

19 Plaintiff presented on December 29, 2014, complaining of anxiety,  
20 numbness in her extremities, chronic neck pain and chronic back pain  
21 (A.R. 946). On examination, Plaintiff reportedly had paraspinal  
22 tenderness and decreased range of motion secondary to pain (A.R. 949).  
23 X-rays of her cervical spine and right shoulder were normal (A.R. 949-  
24 50). She was diagnosed with anxiety and chronic back pain, given a  
25 Toradol injection and prescribed Norco (A.R. 950-51, 960).  
26

27 Plaintiff presented on June 22, 2015, complaining of weakness  
28 with intermittent chest pain (A.R. 1047). On examination, she

1 reportedly appeared anxious and she had some chest wall tenderness to  
2 palpation but an "unremarkable" EKG (A.R. 1048-49, 1052). She was  
3 diagnosed with atypical chest pain and ordered to follow up with her  
4 regular doctor (A.R. 1052).

5  
6 Plaintiff presented on July 21, 2015, complaining of numbness in  
7 her extremities and chronic pain in the right side of her neck (A.R.  
8 1090). On examination, Plaintiff reportedly had tenderness to  
9 palpation of the trapezius muscle (A.R. 1093). Plaintiff was  
10 diagnosed with musculoskeletal pain, given a Toradol injection and  
11 ordered to follow up with her regular doctor (A.R. 1093-94, 1104).

12  
13 Plaintiff presented on August 12, 2015, complaining of anxiety  
14 and neck and jaw pain (A.R. 1121). On examination, there were no  
15 noted abnormalities and an x-ray of Plaintiff's chest showed no acute  
16 cardiopulmonary disease (A.R. 1125-26). Plaintiff was diagnosed with  
17 acute/chronic back pain, stress and anxiety, given a Toradol  
18 injection, Norco, Ativan and a "GI cocktail," and was ordered to  
19 follow up with her regular doctor (A.R. 1126).

20  
21 Plaintiff presented on September 1, 2015, complaining of central  
22 chest pain, headache, face pain on the right side, and neck pain on  
23 the left side (A.R. 691). Plaintiff reportedly had a history of  
24 chronic pain for which she was seeing a pain management specialist,  
25 lumbar disk disease with associated chronic back pain, gastritis, a  
26 neurological problem causing intermittent right-sided weakness,  
27 nonstop menstrual bleeding, and anxiety disorder (A.R. 691).  
28 Examination findings reportedly were normal except for a slightly

1 elevated blood pressure and anxious mood (A.R. 691-92). Plaintiff was  
2 diagnosed with chronic pain syndrome and given a Toradol injection and  
3 Ativan (A.R. 692, 695). Since Plaintiff already had prescriptions for  
4 Norco, Flexeril, Mobic and Gabapentin, she was referred for follow up  
5 with her primary care physician, neurologist and her pain management  
6 specialist (A.R. 692).

7  
8 Plaintiff presented on September 9, 2015, complaining of pain and  
9 numbness from her neck radiating down to her right arm and fingers  
10 (A.R. 1197). On examination, she reportedly had tenderness on passive  
11 range of motion in the right shoulder, pain radiating down the right  
12 extremity, and tenderness to the right paracervical muscles (A.R.  
13 1199-1200). Plaintiff was diagnosed with cervical radiculopathy to  
14 the right upper extremity, given a Toradol injection and Norco, and  
15 prescribed a sling, Norco, Flexeril and Motrin (A.R. 1200, 1210).

16  
17 Plaintiff presented on January 7, 2016, complaining of anxiety,  
18 heart palpitations with pressure, shortness of breath, epigastric  
19 discomfort and bilateral leg pain (A.R. 1392-93). On examination,  
20 Plaintiff reportedly had left upper quadrant tenderness and epigastric  
21 discomfort, but a normal EKG (A.R. 1395-97). She was diagnosed with  
22 gastritis and anxiety, given Valium and a GI cocktail, and ordered to  
23 follow up with her regular doctor (A.R. 1398, 1409-10).

24  
25 Plaintiff presented on March 3, 2016, complaining of chest pain  
26 radiating to the left arm, left calf pain and left calf swelling (A.R.  
27 1478-79). On examination, she reportedly had left chest wall  
28 tenderness and low grade tachycardia consistent with dehydration (A.R.

1 1481-84). She was diagnosed with chest pain, epigastric abdominal  
2 pain, calf pain and dehydration, and referred to her regular doctor  
3 (A.R. 1485).  
4

5 Plaintiff presented on April 4, 2016, complaining of vaginal  
6 bleeding and abdominal pain, nausea and vomiting (A.R. 605).  
7 Plaintiff was diagnosed with possible gastritis or gastroenteritis,  
8 uterine fibroids, anemia, transaminitis probably from ethyl alcohol  
9 abuse, and a urinary tract infection, and she was given a shot of  
10 morphine (A.R. 605-06, 614).  
11

12 Plaintiff presented on April 6, 2016, complaining of heavy  
13 vaginal bleeding and abdominal pain not relieved by Norco (A.R. 655).  
14 Plaintiff was diagnosed with fibroids and abdominal pain and given a  
15 Toradol injection (A.R. 655-56, 662). Plaintiff was referred to her  
16 gynecologist for further evaluation of her fibroids, with a note that  
17 she was due to have a hysterectomy (A.R. 655).<sup>3</sup>  
18

19 Plaintiff presented on July 3, 2016, complaining of neck pain  
20 radiating to the jaw, chest and arm (A.R. 1524). On examination,  
21 Plaintiff reportedly had tenderness to palpation and limited range of  
22 motion in her neck (A.R. 1527-28). Plaintiff was diagnosed with  
23 cervical radiculopathy, given Toradol and Medrol injections and Valium  
24 (A.R. 1529, 1537-38, 1540).  
25  
26

25 ///

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27  
28 <sup>3</sup> Plaintiff underwent an inpatient hysterectomy at the  
St. Francis Medical Center on April 13, 2016 (A.R. 2528-2640).

1 Plaintiff presented to Long Beach Memorial Hospital on July 19,  
2 2016, complaining of chronic neck pain radiating to her jaw and the  
3 back of her head, preventing her from holding her head up (for which  
4 she was placed in a C-collar), generalized weakness and chest pain  
5 (A.R. 1560-61). Cervical spine MRI and CT scans were unremarkable  
6 (A.R. 1565, 1574, 1634). A MRI of Plaintiff's thoracic spine was  
7 suspect for a "dural AV fistula" (A.R. 1582). Plaintiff was admitted  
8 to the hospital, a dural AV fistula was ruled out, and her neck pain  
9 was stabilized with Percocet, Morphine and Tylenol (A.R. 1566, 1569,  
10 1574-75, 1580-82, 1585-90). No clear underlying pathology was found  
11 (A.R. 1588). Plaintiff was referred for chronic pain management (A.R.  
12 1575).

13  
14 Plaintiff then went to the St. Francis Medical Center emergency  
15 room on July 22, 2016, complaining of back pain and headache and  
16 seeking a second opinion after having been admitted to Long Beach  
17 Memorial Hospital where she had been told there were no acute causes  
18 found (A.R. 2407). On examination, Plaintiff reportedly had no  
19 significant findings, so she was ordered to follow up with her primary  
20 doctor, neurologist and pain management specialist (A.R. 2408-09,  
21 2419).

22  
23 Plaintiff presented on September 22, 2016, complaining of chest  
24 pain (A.R. 1724, 1730-31). Testing reportedly was "unremarkable," and  
25 Plaintiff was prescribed Naprosyn and Carafate and ordered to follow  
26 up with her primary care physician (A.R. 1724, 1730-31).

27 ///

28 ///

1       **D. Opinions of Consultative Examiners and State Agency**  
2       **Physicians**  
3

4       The consultative examiners and state agency physicians all  
5       evaluated Plaintiff's condition in December of 2014, which was prior  
6       to the time Plaintiff was diagnosed with fibromyalgia, and also prior  
7       to the time of most of the treatment summarized above.  
8

9       Consultative examiner Dr. Carlos Murales prepared a  
10      "Comprehensive Psychiatric Evaluation" dated December 11, 2014 (A.R.  
11      565-69). Dr. Murales reviewed no psychiatric records (A.R. 565).  
12      Plaintiff reportedly complained of anxiety and depression (A.R. 565).  
13      Plaintiff was taking Lorazepam, Tramadol, Pantoprazole, Meclizine and  
14      Flexeril (A.R. 566). Dr. Murales diagnosed generalized anxiety  
15      disorder and chronic dysthymic disorder (A.R. 568). Dr. Murales  
16      stated that Plaintiff has a "prominent medical condition that hinders  
17      her capability to work or function," and she has an anxiety disorder  
18      that "contributes to this incapacity but not to the point that she is  
19      not able to perform either with others or at work" (A.R. 569). Dr.  
20      Murales opined that Plaintiff has no functional limitations from a  
21      psychiatric standpoint (A.R. 569).  
22

23      Consultative examiner Dr. Michael Wallack prepared a "Complete  
24      Internal Medicine Evaluation" dated December 23, 2014 (A.R. 573-79).  
25      Dr. Wallack reviewed no medical records (A.R. 574). Plaintiff  
26      reportedly complained of low back pain for several years that radiated  
27      down her left leg, pain in her mid and upper back, buttocks, and neck  
28      that radiated to both hips, arms, and legs, and chest pain related to

1 her anxiety (A.R. 573-74). Dr. Wallack stated that Plaintiff had not  
2 been given any injections, but had been prescribed Vicodin and had  
3 used a heating pad for her pain (A.R. 573). Plaintiff reportedly said  
4 her symptoms increased with sitting, standing, walking, lifting and  
5 bending, and she cannot climb stairs (A.R. 573). Within the space of  
6 two sentences, Dr. Wallack stated both that Plaintiff is a "poor  
7 historian" and that Plaintiff "appears to be a reliable historian"  
8 (A.R. 573).

9  
10 On examination, Plaintiff reportedly had an inconsistent,  
11 intermittent limp favoring the left leg (which Dr. Wallack suggested  
12 may represent "exaggeration"), no other reported abnormalities, and an  
13 unremarkable lumbar spine x-ray (A.R. 575-78, 580). Dr. Wallack  
14 diagnosed low back pain, chest pain, controlled GERD, acne and  
15 obesity, and assessed no limitations (A.R. 577-78).<sup>4</sup>

16  
17 State agency physicians reviewed the record as of December of  
18 2014, and opined that Plaintiff would have no limitations

19  
20 <sup>4</sup> The record contains a treatment note from Dr. Salvatore  
21 Danna dated June 8, 2015, also suggesting that Plaintiff may have  
22 been embellishing her symptoms. See A.R. 1976-77. Dr. Danna  
23 indicated that Plaintiff has a history of pain throughout her  
24 body without a "well-documented diagnosis" (A.R. 1976). On  
25 examination, Plaintiff reportedly had depression, pressured  
26 speech, some psychomotor retardation, moderate spasm and  
27 decreased range of motion in the low back, sensory loss, and gait  
28 with some stiffness of her back and protection of her low back  
with small steps and gentle movements (A.R. 1976). Dr. Danna  
opined that Plaintiff had carpal tunnel syndrome and early  
discogenic disease of the lumbosacral spine (A.R. 1976). Dr.  
Danna ordered EMG and nerve conduction studies (A.R. 1977). Dr.  
Danna prescribed Mobic, Neurontin and Plavix (A.R. 1977). There  
are no later records from Dr. Danna.



1 (A.R. 424-31) .

2  
3 **II. The ALJ's Erred in the Evaluation of the Medical Opinion**  
4 **Evidence.**

5  
6 In assessing Plaintiff's physical residual functional capacity,  
7 the ALJ gave "little" weight to Dr. Razalan's and Dr. De Perio's  
8 opinions (A.R. 57-58). The ALJ asserted that these doctors' opinions:  
9 (1) appeared "excessive and inconsistent with the weight of the  
10 medical evidence"; (2) were contradicted by the opinion of the non-  
11 examining medical expert;<sup>5</sup> and (3) appeared to have been based on  
12 Plaintiff's subjective allegations of pain, taken "at face value"  
13 (A.R. 57-58) .

14  
15 A treating physician's conclusions "must be given substantial  
16 weight." Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988); see  
17 Rodriguez v. Bowen, 876 F.2d 759, 762 (9th Cir. 1989) ("the ALJ must  
18 give sufficient weight to the subjective aspects of a doctor's  
19 opinion. . . . This is especially true when the opinion is that of a  
20 treating physician") (citation omitted); see also Garrison v. Colvin,  
21 759 F.3d 995, 1012 (9th Cir. 2014) (discussing deference owed to the  
22 opinions of treating and examining physicians). Even where the  
23 treating physician's opinions are contradicted, as here, "if the ALJ  
24 wishes to disregard the opinion[s] of the treating physician he . . .  
25 must make findings setting forth specific, legitimate reasons for

26  
27 <sup>5</sup> The record variously references the non-examining  
28 medical expert as Dr. Ostrow, Dr. Arstrow, Dr. Astrow and Dr.  
Ostarin (A.R. 49, 57, 58, 406-09) .

1 doing so that are based on substantial evidence in the record."  
2 Winans v. Bowen, 853 F.2d 643, 647 (9th Cir. 1987) (citation,  
3 quotations and brackets omitted); see Rodriguez v. Bowen, 876 F.2d at  
4 762 ("The ALJ may disregard the treating physician's opinion, but only  
5 by setting forth specific, legitimate reasons for doing so, and this  
6 decision must itself be based on substantial evidence") (citation and  
7 quotations omitted).

8  
9 The reasons the ALJ stated for rejecting Dr. Razalan's and Dr. De  
10 Perio's opinions do not comport with these authorities. First, with  
11 regard to the weight of the medical evidence, the ALJ stated that the  
12 "medical records do not indicate that [Plaintiff's] pain in [sic]  
13 symptoms consistently have limited her mobility, strength, or  
14 sensation" (A.R. 55). The ALJ also observed that Plaintiff sometimes  
15 reported feeling well with no complaints and no findings of  
16 abnormalities on examination, and at other times there was evidence of  
17 diminished motion in the spine, positive straight leg raising tests  
18 and neurological deficits. See A.R. 55-58 (acknowledging that  
19 Plaintiff reported that her symptoms wax and wane). The ALJ also  
20 observed that, while Drs. Razalan and De Perio opined that Plaintiff  
21 has significant limits, Dr. Wallack stated that, when he examined  
22 Plaintiff, she was "reasonably agile and walking without an assistive  
23 device," "got on and off the examination table without difficulty,"  
24 had no tenderness on palpation of the back in the midline and  
25 paraspinal areas and otherwise had largely normal examination findings  
26 (A.R. 56). According to the ALJ, the objective clinical findings did  
27 not suggest that Plaintiff's pain causes significant limitations,  
28 particularly in the areas of standing and walking, because: (1) there

1 reportedly were no reported gait abnormalities (but see A.R. 575 (Dr.  
2 Wallack noting that Plaintiff walked with an inconsistent limp) and  
3 A.R. 1976 (Dr. Danna noting a stiff gait with small steps and gentle  
4 movements)); (2) Plaintiff reportedly was ambulatory without  
5 assistance; and (3) Plaintiff did not have documented "persistent  
6 restrictions in motion," ongoing neurological abnormalities,  
7 significant disuse atrophy, or reports of constant tender points as  
8 one might expect to find with the limitations Drs. Razalan and De  
9 Perio suggested (A.R. 58).

10  
11 An ALJ properly may discount a treating physician's opinions that  
12 are in conflict with treatment records or are unsupported by objective  
13 clinical findings. See Bayliss v. Barnhart, 427 F.3d 1211, 1216 (9th  
14 Cir. 2005) (conflict between treating physician's assessment and the  
15 treating physician's own clinical notes can justify rejection of  
16 assessment); Batson v. Commissioner, 359 F.3d 1190, 1195 (9th Cir.  
17 2004) ("an ALJ may discredit treating physicians' opinions that are  
18 conclusory, brief, and unsupported by the record as a whole . . . or  
19 by objective medical findings"); Connett v. Barnhart, 340 F.3d 871,  
20 875 (9th Cir. 2003) (treating physician's opinion properly rejected  
21 where physician's treatment notes "provide no basis for the functional  
22 restrictions he opined should be imposed on [the claimant]"); see also  
23 Rollins v. Massanari, 261 F.3d 853, 856 (9th Cir. 2001) (ALJ properly  
24 may reject treating physician's opinions that "were so extreme as to  
25 be implausible and were not supported by any findings made by any  
26 doctor . . ."); 20 C.F.R. §§ 404.1527(c), 416.927(c) (factors to  
27 consider in weighing treating source opinion include the  
28 supportability of the opinion by medical signs and laboratory findings

1 as well as the opinion's consistency with the record as a whole).

2  
3 In the present case, however, no doctor discerned and identified  
4 any specific inconsistency between the treating physicians' opinions  
5 and the medical record. The ALJ never asked the non-examining medical  
6 expert whether there was any inconsistency between the treating  
7 physicians' opinions and the medical record. The medical expert  
8 apparently had reviewed some of the opinions of Dr. Razalan and Dr. De  
9 Perio. See A.R. 409 (medical expert confirming reviewing medical  
10 evidence through exhibit "15F" (i.e., A.R. 2402)). However, the  
11 medical expert did not discuss any opinion evidence (other than his  
12 own), did not discuss the medical record in any detail and did not  
13 even attempt to explain why the record supposedly supported his own  
14 opinion (A.R. 409-12). The state agency physicians did not review the  
15 opinions of Dr. Razalan or Dr. De Perio. See A.R. 424-32. The ALJ's  
16 lay discernment of an asserted inconsistency between medical record  
17 findings and the treating physicians' opinions cannot constitute  
18 substantial evidence. See Balsamo v. Chater, 142 F.3d 75, 81 (2d Cir.  
19 1998) (an "ALJ cannot arbitrarily substitute his own judgment for  
20 competent medical opinion") (internal quotation and citation omitted);  
21 Rohan v. Chater, 98 F.3d 966, 970 (7th Cir. 1996) ("ALJs must not  
22 succumb to the temptation to play doctor and make their own  
23 independent medical findings"); Day v. Weinberger, 522 F.2d 1154, 1156  
24 (9th Cir. 1975) (an ALJ is forbidden from making his or her own  
25 medical assessment beyond that demonstrated by the record).

26  
27 Moreover, as stated in Social Security Ruling ("SSR") 12-2p,  
28 fibromyalgia involves pain in all quadrants of the body which

1 "fluctuate[s] in intensity and may not always be present." See SSR  
2 12-2p, 2012 WL 3104869, at \*2 (July 25, 2012) (following American  
3 College of Rheumatology Criteria for the Classification of  
4 Fibromyalgia); see also Terry v. Sullivan, 903 F.2d 1273, 1275 n.1  
5 (9th Cir. 1990) (SSRs are binding on the Administration). "[T]o date  
6 there are no laboratory tests to confirm the diagnosis [of  
7 fibromyalgia]." Benecke v. Barnhart, 379 F.3d 587, 590 (9th Cir.  
8 2004); see also Revels v. Berryhill, 874 F.3d 648, 666 (9th Cir. 2017)  
9 ("Revels") (observing that fibromyalgia is diagnosed in part by  
10 evidence showing that another condition does not account for a  
11 patient's symptoms). The ALJ did not acknowledge the fact that a  
12 fibromyalgia sufferer will often display normal muscle strength and  
13 unremarkable neurological and musculoskeletal results on examination.  
14 See Revels 874 F.3d at 656 ("What is unusual about the disease is that  
15 those suffering from it have muscle strength, sensory functions, and  
16 reflexes that are normal. Their joints appear normal, and further  
17 musculoskeletal examination indicates no objective joint swelling.  
18 Indeed, there is an absence of symptoms that a lay person may  
19 ordinarily associate with joint and muscle pain.") (internal  
20 citations, quotations, and brackets omitted).

21  
22 Neither the ALJ nor this Court possesses the medical expertise to  
23 know whether the objective medical evidence is inconsistent with the  
24 limitations Plaintiff's treating physicians found to exist. The ALJ's  
25 lay inferences from Plaintiff's "normal" examinations and reports  
26 (which conflict with other examinations and reports reflecting  
27 allegedly debilitating pain) cannot properly impugn the medical  
28 opinions in this case. See Revels 874 F.3d at 656-57; cf. Coleman v.

1 Astrue, 423 Fed. App'x 754, 755 (9th Cir. 2011) (ALJ erred by  
2 "rel[ying] on the absence of objective physical symptoms of severe  
3 pain as a basis for disbelieving [claimant's] testimony regarding"  
4 effects of fibromyalgia).

5  
6 The ALJ also questioned Plaintiff's treatment, stating that  
7 Plaintiff:

8  
9 was never prescribed particularly potent medication to  
10 control her pain levels (e.g., Fentanyl and Methadone).  
11 Rather, pain management records suggest that, primarily, she  
12 was only prescribed Hydrocodone - Acetaminophen or some  
13 variation, which is not a particularly potent opioid.

14  
15 (A.R. 56). As the ALJ elsewhere admitted, however, Plaintiff did  
16 receive trigger point injections (Toradol) on multiple occasions (A.R.  
17 55). Plaintiff also received two lumbar epidural steroid injections  
18 for pain. (A.R. 1979, 1981, 1822-24). Given these facts, and the  
19 nature of Plaintiff's impairments, the pain treatment actually  
20 received by Plaintiff does not furnish a legitimate reason for  
21 rejecting the treating physicians' opinions.

22  
23 With regard to the contradiction of the treating physicians'  
24 opinions with the non-examining medical expert's opinion, the  
25 contradiction of a treating physician's opinion triggers rather than  
26 satisfies the requirement of stating specific, legitimate reasons for  
27 discounting such an opinion. See, e.g., Valentine v. Commissioner,  
28 574 F.3d 685, 692 (9th Cir. 2007); Orn v. Astrue, 495 F.3d 625, 631-33

1 (9th Cir. 2007); Lester v. Chater, 81 F.3d 821, 830-31 (9th Cir.  
2 2007). In any event, "[t]he opinion of a nonexamining physician  
3 cannot by itself constitute substantial evidence that justifies  
4 rejection of the opinion of . . . a treating physician. Lester v.  
5 Chater, 81 F.3d at 831.

6  
7 Finally, the ALJ's speculation that the treating physicians  
8 uncritically accepted at "face value" all of Plaintiff's subjective  
9 allegations of pain is not a specific and legitimate reason for  
10 rejecting the treating physicians' opinions. An ALJ may not reject a  
11 treating physician's opinion based on mere speculation concerning the  
12 basis for the physician's opinion. Lester v. Chater, 81 F.3d at 832.  
13 In particular, an ALJ may not properly speculate that a treating  
14 physician's opinion was based simply on an uncritical acceptance of a  
15 claimant's subjective complaints. See Langley v. Barnhart, 373 F.3d  
16 1116, 1120-21 (10th Cir. 2004) (ALJ "improperly rejected" treating  
17 physician's opinion in reliance on, inter alia, the ALJ's "speculative  
18 conclusion" that the physician's opinion was "based on the claimant's  
19 subjective complaints"); Overby v. Colvin, 2016 WL 1178951, at \*5  
20 (W.D. Wash. March 8, 2016), adopted, 2016 WL 1170362 (W.D. Wash.  
21 March 25, 2016) ("The Court agrees with Plaintiff that the ALJ's  
22 speculation as to the reasons why [the treating physician] opined as  
23 he did is not a legitimate reason to discount the opinion . . .")  
24 (dicta); Gordon v. Colvin, 2015 WL 685396, at \*4 (C.D. Cal. Feb. 17,  
25 2015) ("the ALJ's conclusion that [the treating physician] relied  
26 wholly and uncritically on plaintiff's subjective complaints is  
27 unsupported in the record"; the court observed that the treating  
28 physician had tested, interviewed and monitored the claimant's

1 treatment for years); Hill v. Astrue, 2011 WL 4587688, at \*3 (E.D.  
2 Okla. Sept. 30, 2011) ("the ALJ's speculation that [the treating  
3 counsellor's] opinions were the result of complete acceptance of and  
4 reliance on claimant's subjective complaints was inappropriate");  
5 Moore v. Astrue, 2009 WL 724056, at \*7 (D. Colo. March 18, 2009)  
6 (reversing ALJ's rejection of treating physician's opinion, finding  
7 that the ALJ's stated reason that "it appears [the physician] relied  
8 on [the claimant's] subjective complaints" was "improperly based on  
9 the ALJ's speculation"); cf. Mayes v. Massanari, 276 F.3d 453, 459-60  
10 (9th Cir. 2001) (ALJ's duty to develop the record further is triggered  
11 "when there is ambiguous evidence or when the record is inadequate to  
12 allow for the proper evaluation of the evidence") (citation omitted);  
13 Brown v. Heckler, 713 F.2d 441, 443 (9th Cir. 1983) ("[T]he ALJ has a  
14 special duty to fully and fairly develop the record to assure the  
15 claimant's interests are considered. This duty exists even when the  
16 claimant is represented by counsel.").

17  
18 Also significant to this analysis is the fact that the ALJ found  
19 Plaintiff has severe fibromyalgia. As the Ninth Circuit recognized in  
20 Revels, fibromyalgia is diagnosed "entirely on the basis of the  
21 patients' reports of pain and other symptoms." See Revels, 874 F.3d  
22 at 656 (citing Benecke v. Barnhart, 379 F.3d at 590). "In evaluating  
23 whether a claimant's residual functional capacity renders them [sic]  
24 disabled because of fibromyalgia, the medical evidence must be  
25 construed in light of fibromyalgia's unique symptoms and diagnostic  
26 methods . . ." (id.). Hence, a certain degree of reliance on the  
27 subjective complaints of a fibromyalgia sufferer inevitably will be a  
28 ///



1 part of any assessment of the sufferer's residual functionality.<sup>6</sup>

2  
3 **III. The Court is Unable to Deem the ALJ's Errors Harmless; Remand for**  
4 **Further Administrative Proceedings is Appropriate.**

5  
6 The Court is unable to conclude that the ALJ's errors were  
7 harmless. See Treichler v. Commissioner, 775 F.3d 1090, 1105 (9th  
8 Cir. 2014) ("Where, as in this case, an ALJ makes a legal error, but  
9 the record is uncertain and ambiguous, the proper approach is to  
10 remand the case to the agency"); see also Molina v. Astrue, 674 F.3d  
11 1104, 1115 (9th Cir. 2012) (an error "is harmless where it is  
12 inconsequential to the ultimate non-disability determination")  
13 (citations and quotations omitted); McLeod v. Astrue, 640 F.3d 881,  
14 887 (9th Cir. 2011) (error not harmless where "the reviewing court can  
15 determine from the 'circumstances of the case' that further  
16 administrative review is needed to determine whether there was  
17 prejudice from the error").

18  
19 Remand is appropriate because the circumstances of this case  
20 suggest that further administrative review could remedy the ALJ's  
21 errors. McLeod v. Astrue, 640 F.3d at 888; see also INS v. Ventura,  
22 537 U.S. 12, 16 (2002) (upon reversal of an administrative  
23 determination, the proper course is remand for additional agency  
24 investigation or explanation, except in rare circumstances); Dominquez

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25  
26 <sup>6</sup> In this regard, it also may be significant that the ALJ  
27 purported to rely on Dr. Wallack's and Dr. Danna's suggestions  
28 that Plaintiff might be embellishing her symptoms, even though  
these doctors made such suggestions before Plaintiff had been  
diagnosed with fibromyalgia (A.R. 59).

1 v. Colvin, 808 F.3d 403, 407 (9th Cir. 2015) ("Unless the district  
2 court concludes that further administrative proceedings would serve no  
3 useful purpose, it may not remand with a direction to provide  
4 benefits"); Treichler v. Commissioner, 775 F.3d at 1101 n.5 (remand  
5 for further administrative proceedings is the proper remedy "in all  
6 but the rarest cases"); Garrison v. Colvin, 759 F.3d 995, 1020 (9th  
7 Cir. 2014) (court will credit-as-true medical opinion evidence only  
8 where, inter alia, "the record has been fully developed and further  
9 administrative proceedings would serve no useful purpose"); Harman v.  
10 Apfel, 211 F.3d 1172, 1180-81 (9th Cir.), cert. denied, 531 U.S. 1038  
11 (2000) (remand for further proceedings rather than for the immediate  
12 payment of benefits is appropriate where there are "sufficient  
13 unanswered questions in the record"). There remain significant  
14 unanswered questions in the present record, particularly with regard  
15 to: (1) the bases for the treating physicians' opinions; and (2) the  
16 impact of the relatively recent diagnosis of fibromyalgia, a severe  
17 impairment which was not factored into most of the physicians'  
18 assessments of Plaintiff's functional capacity.

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1 **CONCLUSION**

2

3 For all of the foregoing reasons, Plaintiff's and Defendant's

4 motions for summary judgment are denied and this matter is remanded

5 for further administrative action consistent with this Opinion.

6

7 LET JUDGMENT BE ENTERED ACCORDINGLY.

8

9 DATED: March 7, 2019.

10

11

12 /s/

13 CHARLES F. EICK

14 UNITED STATES MAGISTRATE JUDGE

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